

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BRIAN D. NICHOLSON**

Claimant

V.

**SIGNATURE BUILDERS, LLC**

Respondent

AND

**AMERICAN FAMILY**

**MUTUAL INSURANCE CO.**

Insurance Carrier

Docket No. 1,056,556

**ORDER**

Claimant requested review of the May 20, 2013 Award. The Board heard oral argument on September 4, 2013. Jon Voegeli, of Wichita, Kansas, appeared for claimant. Steven J. Quinn, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The Award indicated claimant sustained an 11.5% impairment of function to the body as a whole based on a split of the impairment ratings, and a 25% task loss. However, claimant was not entitled to a permanent partial general (work) disability because he failed to prove his post-injury wage loss percentage.

The Board has considered the record and adopted the Award's stipulations. At oral argument, the parties agreed that a split of the impairment ratings should be 12.5% to the body as a whole. The parties also agreed that the compensation rate should be \$373.35 instead of \$373.33. The Board adopts these stipulations as well. Claimant agreed in his brief and at oral argument that cash payments he made to employees should be attributable to him for the purpose of determining his post-injury earnings.

**ISSUES**

Claimant argues he suffered post-injury wage loss of at least 10% and is entitled to a 53% work disability award. Respondent maintains the Award should be affirmed.

The issue for the Board's review is:

What is the nature and extent of claimant's disability?

### FINDINGS OF FACT

On October 10, 2010, claimant and a coworker or employee, Dan Gottschalk, were installing siding on a new addition. Claimant and Mr. Gottschalk had to work above a roof using a ladder. The base of the ladder was held in place by a board that other, unidentified workers had left screwed into the roof. Claimant was at the base of the ladder and Mr. Gottschalk was farther up the ladder. As they were attempting to install a piece of siding, the board supporting the ladder broke free from the roof, causing the ladder, claimant and Mr. Gottschalk to fall about 18 feet to the ground.

Claimant hit the ground first, landing on a concrete patio with his left foot. Mr. Gottschalk landed on top of him. Mr. Gottschalk was unhurt, but claimant experienced immediate pain in his left lower extremity and back. He was taken by his foreman, Lanny, to the Hays Medical Center emergency room, where he was diagnosed with a closed fracture of the left calcaneus. He was treated conservatively with immobilization of the left foot until the fracture healed, and had extended physical therapy.

Claimant was treated by Drs. Hemmerman and Sharma and released in April 2011 as having reached maximum medical improvement (MMI). Claimant was paid 26.57 weeks of temporary total disability (TTD) benefits from October 12, 2010 through April 15, 2011. Claimant did not return to work for respondent. Prior to reaching MMI, he began working as a self-employed contractor under the name D & M Home Repair.

On September 22, 2011, claimant was examined at respondent's request by Frederick Smith, M.D. Dr. Smith is board certified in physical medicine and rehabilitation, as well as certified as an independent medical examiner. Dr. Smith opined that claimant had an 11% impairment of function to the left lower extremity (which converts to a 4% impairment of function to the body as a whole), as based upon the *AMA Guides*.<sup>1</sup> Because claimant had never received treatment for his back and hip complaints, Dr. Smith recommended an orthopedic evaluation.

On December 27, 2011, claimant was seen at his attorney's request by David Hufford, M.D., who is board certified in family practice and as an independent medical examiner. Dr. Hufford diagnosed claimant with thoracic and lumbar strains, left hip pain, and a closed left calcaneal fracture. Dr. Hufford rated claimant as having a 5% whole body impairment to the thoracic spine based on DRE Thoracolumbar Category II, a 5% whole body impairment to the lumbar spine based on DRE Lumbosacral Category II, and an 18% impairment to the left lower extremity (which converts to a 7% impairment to the body as a whole), for a combined rating of 16% to the body as a whole, pursuant to the *Guides*.

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Hufford recommended permanent restrictions of avoidance of ladders, as well as allowing occasional standing and walking for no more than two consecutive hours with the allowance of a short rest break. Claimant was allowed to perform medium level work, which includes constant lifting limited to 10 pounds, frequent lifting limited to 20 pounds, and occasional lifting of up to 50 pounds.

Dr. Hufford reviewed the task list prepared by Doug Lindahl<sup>2</sup> and opined claimant had lost the ability to perform 12 of 24 tasks for a 50% task loss.

On March 5, 2012, claimant returned to Dr. Smith after having been released by an orthopedic surgeon. The record is absent as to the treatment claimant received between September 22, 2011 and March 5, 2012. Dr. Smith rated claimant as having a 5% whole body impairment to the lumbar spine based upon DRE Lumbosacral Category II, pursuant to the *Guides*. Combining the 4% whole body rating for the leg impairment with the 5% whole body impairment for the low back, Dr. Smith's overall rating was 9% to the body as a whole.<sup>3</sup>

Dr. Smith recommended claimant follow permanent restrictions of taking 5-10 minute breaks every 1-2 hours to sit down and take the strain off of his leg, foot and back. Dr. Smith reviewed the task lists of both Mr. Lindahl and Mary Kay Titterington,<sup>4</sup> and opined claimant retained the ability to perform all of the tasks, assuming he could take his time and rest in accordance with such doctor's permanent restrictions.

Claimant testified that regular hearing Exhibit 1, his handwritten recap of his 2011 and 2012 earnings, represented all of his earnings in those years, consisting of \$10,868 in 2011 and \$7,414 in 2012.<sup>5</sup> He told Mr. Lindahl that he earned an average of \$171 per week between September 2011 and April 2012. Claimant did not provide Ms. Titterington with records of the money he earned on a post-injury basis, only telling her that he made \$500 profit on the last job he worked.

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<sup>2</sup> Mr. Lindahl, a vocational rehabilitation counselor, interviewed claimant on April 19, 2012, for a vocational assessment.

<sup>3</sup> Respondent paid claimant permanent partial disability (PPD) benefits based on Dr. Smith's rating of 9% to the body as a whole in the amount of \$13,555.13. Claimant deposited part of this money into his business account on June 4, 2012.

<sup>4</sup> Ms. Titterington, a vocational consultant, interviewed claimant on January 15, 2013, for a vocational assessment.

<sup>5</sup> Claimant, in his brief, later alleged earning \$11,459.70 from April 15, 2011 until December 31, 2011, and \$10,657.86 in 2012. Claimant's Brief at 11, 13 (filed June 20, 2013).

Insofar as claimant's regular hearing Exhibits 1 and 2 were not produced until the regular hearing, respondent was given the opportunity to have claimant testify at a subsequent evidentiary deposition. A subpoena duces tecum, dated January 25, 2013, was sent to claimant's attorney in advance of claimant's March 18, 2013 evidentiary deposition, which was titled "CONTINUATION OF REGULAR HEARING TESTIMONY OF BRIAN NICHOLSON." The subpoena duces tecum requested production of various documents, including (with claimant's response in italics):

- personal and business bank statements for 2010, 2011 and 2012

*Claimant produced records for his personal and business accounts for 2011 and 2012 at the Continuation of the Regular Hearing held March 18, 2013. For the D & M Home Repair account (account no. 2408), 2010 records were not produced, but statements were produced for all of 2011, and all of 2012, except for December 2012. For claimant's personal account (account no. 1428), statements were produced from July 10, 2011 through December 10, 2012. Respondent did not request an explanation as to why the production of these records was limited. Claimant testified that he asked his bank for copies of his pre-July 2011 personal account records the morning of his evidentiary deposition. Exhibit 10 of the regular hearing also shows various bank transactions from May 2011 through February 28, 2013. Claimant denied having any other bank accounts in 2010, 2011 and 2012.<sup>6</sup>*

- work invoices

*Claimant previously produced nine invoices at the regular hearing. He did not produce additional invoices at his evidentiary deposition. He testified at his evidentiary deposition that he lost a sales book with five or six receipts. Claimant previously testified at his discovery deposition that he believed his 2012 invoices or receipts were perhaps in an employee's car in Kansas City.*

- personal and/or business tax returns for 2010, 2011 and 2012

*Claimant testified he did not file personal or business taxes for 2010, 2011 or 2012. No returns were available for production. Claimant testified that he intended to file tax returns for such years, but had not obtained any extensions. Claimant testified that he put off filing taxes because he thought he would have to pay taxes, but wanted to get his workers compensation case resolved before doing so.<sup>7</sup>*

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<sup>6</sup> Business and bank records from 2010 are not particularly relevant, insofar as claimant was injured on October 10, 2010 and it is improbable that claimant worked the remainder of the year.

<sup>7</sup> Records from the Social Security Administration do not reflect the claimant having earnings from 2008 through 2010 when he was self-employed. Such records stop listing income in 2008.

- checkbook or computer software ledger showing money going into or out of claimant's business for the years 2010, 2011 and 2012

*Claimant denied the existence of a checkbook or computer ledger.*

- a list of vendors with whom claimant dealt in 2010 and 2011

*Claimant testified he worked with only two vendors, Home Depot and Heartland.*

- copies of any Form 1099 which may have been sent to vendors and copies of any Form 1099 he may have received for work in 2010 and 2011

*Claimant denied sending or receiving any Form 1099.*

- names of any employees for 2010, 2011 and 2012

*Claimant identified his employees as Danny Gottshalk, Jeff Casper, Tanner Huebner and Robert Lawrence, who was paid \$50 for working one day.*

In reviewing claimant's discovery deposition, regular hearing and continuation of regular hearing testimony, the administrative law judge noted in the Award's Appendix A that claimant:

- earned \$28,887.25 in 2011 and had a post-injury average weekly wage in 2011 of \$707.31, which results in no wage loss;
- earned \$22,988.86 in 2012 and had a post-injury average weekly wage in 2012 of \$499.76, for an 11% wage loss in 2012; and
- earned \$3,520 from January 1, 2013 through February 28, 2013, and a had a post-injury average weekly wage in 2013 of \$417.56, for a 25% wage loss in early-2013.<sup>8</sup>

However, the Award concluded claimant failed to prove wage loss sufficient for a work disability award. The Award states:

Claimant did not return to work for Respondent. Prior to achieving MMI, and while still receiving Temporary Total Disability (TTD) benefits, Claimant began working as a self-employed small contractor. In February and March of 2012, Claimant performed some remodeling work on the home in which he lived and paid rent. He received a rent abatement of \$600.00 for the work he performed.

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<sup>8</sup> Appendix A to Award (May 20, 2013).

Claimant's post-injury earnings are difficult to assess. He has not filed an income tax return since 2009. He did not file in 2010, 2011, or 2012. While he has repeatedly testified that he keeps receipts to show what income he has earned, and what expenses he has incurred, he has demonstrably failed to produce significant or substantial documentation, and the documentation he has produced is often internally inconsistent.

Set forth in the attached Appendix A is an assessment of Claimant's post-injury earnings, determined by reference to his testimony at a discovery deposition, his testimony at Regular Hearing, his testimony at an evidentiary deposition subsequent to the Regular Hearing, and the exhibits produced. Where the record demonstrates multiple transactions on or near the same date, in similar amounts, the court inferred a single transaction, unless Claimant's testimony and documentation identified multiple customers or transactions. Reference is made in the appendix to the source of the information about the transaction. Where no customer name is set forth in connection with a specific transaction, none appears in the record.

. . .

In **Bergstrom v. Spears Manufacturing**, 289 Kan. 605, 214 P.3d 676 (2009), the Kansas Supreme Court rejected any requirement that a claimant exercise good faith in trying to keep her job, or in trying to find alternative employment, as a condition of receiving work disability benefits. Following ***Bergstrom***, the court only looks to whether a loss of income followed a Claimant's work-injury.

A thorough review of the record establishes that no one, other than Claimant (and possibly not even Claimant himself) knows what his post-injury earnings are. Claimant's inconsistent testimony and his failure or refusal to produce documentation regarding his earnings and expenses, documentation he insists he maintains, precludes a finding that Claimant has suffered a wage loss. Indeed, the information set forth in Appendix A [footnote omitted] suggests that Claimant has earned, and is earning, wages in excess of his pre-injury wages. Claimant's failure or refusal to produce the documentation he insists he has and maintains gives rise to an inference that the documentation would be contrary to his position. **Claimant has failed to sustain his burden of proof that his current wages are less than 90% of his pre-injury average gross weekly wage. Accordingly, Claimant is limited to his functional impairment** (bold emphasis in original).<sup>9</sup>

Claimant filed a timely petition for review thereafter.

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<sup>9</sup> Award at 5-7 (May 20, 2013).

### PRINCIPLES OF LAW

In workers compensation litigation, it is claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>10</sup>

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. . . . Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

### ANALYSIS

The overriding question is whether claimant proved at least 10% post-injury wage loss to qualify for a permanent partial general (work) disability award.

### Wage Loss

*Goudy*,<sup>11</sup> an unpublished appellate case, sets forth some analysis where a claimant failed to prove at least 10% post-injury wage loss. Prior to the case being appealed, the Board had immense difficulty determining Goudy's post-injury wage:

The conundrum is determining claimant's wage loss from May 9, 2007, and following. From May 9, 2007, through the date of the regular hearing (September 7, 2010), claimant worked as an independent subcontractor or contractor, with the exception of a short period of time for the period of approximately April 15, 2010, through May 5, 2010, when he earned \$12 per hour working approximately 30 hours a week for Loux Home Improvement. Claimant's lackadaisical record keeping makes it nearly impossible to determine what he earned as an independent subcontractor or contractor.

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<sup>10</sup> K.S.A. 2010 Supp. 44-501 & K.S.A. 2010 Supp. 44-508(g).

<sup>11</sup> *Goudy v. Exide Technologies*, No. 106,385, 283 P.3d 840 (Kansas Court of Appeals unpublished decision dated Aug. 31, 2012).

From May 9, 2007, through December 31, 2007, claimant had no earnings information whatsoever. Claimant indicated he earned \$7,000 in 2008 and \$12,947 in 2009, but introduced no tax or business records to verify his income. Claimant's earnings for 2010 are equally nebulous except for the three weeks he worked at Loux Home Improvement. From May 6, 2010, through approximately September 6, 2010, claimant testified he was paid \$13 per hour to brush hog, but it appears that at the time he was still working as an independent contractor. Claimant admitted that he had worked mainly on a cash basis and did not always report all of his subcontracting work earnings.<sup>12</sup>

Nonetheless, the Board concluded Goudy proved more than 10% wage loss because his testimony was the only evidence regarding his post-injury earnings.

The Kansas Court of Appeals noted that the administrative law judge doubted Goudy's credibility, largely because he did not report all of his cash income and his inability to produce documentation of his income, which was ostensibly with a bookkeeper he allegedly could not locate. The Court ultimately concluded:

Goudy had the burden to prove his right to compensation and the various conditions on which the right depends. See K.S.A.2005 Supp. 44-501(a); K.S.A.2005 Supp. 44-508(g). Having independently reviewed the record we are not persuaded that Goudy met his burden. The evidence of wage loss was not "substantial" or "evidence possessing something of substance and relevant consequence to induce the conclusion that the award was proper, furnishing a basis of fact from which the issue raised could be easily resolved. [Citation omitted.]" See *Redd v. Kansas Truck Center*, 291 Kan. 176, 183-84, 239 P.3d 66 (2010). The only evidence of wage loss Goudy presented was his testimony which primarily consisted of conjecture, estimations, and inconsistencies. Moreover, Goudy's credibility was specifically challenged by the ALJ, a point not addressed by the Board majority. These considerations, coupled with the lack of any primary documentation of wages earned by Goudy since 2006, convince us that Goudy has failed to prove a substantial wage loss.

When viewed in light of the record as a whole, substantial competent evidence does not support the Board's finding that Goudy suffered a wage loss of more than 10% of his preinjury average weekly wage.

An Appeals Board case, *McKnab*,<sup>13</sup> comments on similar issues:

Claimant initially represented he possessed the records to substantiate his income and expenses from his endeavors. Later, however, it was discovered that was not true. Moreover, claimant's failure to file income tax returns for 2002, 2003, and 2004 further thwarted the search for the truth.

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<sup>12</sup> *Goudy v. Exide Technologies*, No. 1,049,789, 2011 WL 2693257 (Kan. WCAB June 7, 2011).

<sup>13</sup> *McKnab v. U.S. Food*, No. 262,847, 2006 WL 2328055 (Kan. WCAB July 1, 2006).



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This is a matter regarding claimant's burden of proof. And claimant has failed to satisfy that burden. In summary, the Board affirms the Judge's finding that claimant failed to prove his post-injury wage and, therefore, failed to prove his post-injury wage loss exceeded 10 percent. Consequently, the Judge properly limited claimant's permanent disability benefits to his 10 percent whole person functional impairment rating.

This case has some similarities, but also dissimilarities, with *Goudy* and *McKnab*. There is certainly some evidence against claimant proving his post-injury wages:

- he received some TTD while working;
- his maintenance of business records showing income is sorely lacking;
- he did not submit some records he purported to possess that might verify his post-injury earnings, including invoices and receipts, and;
- claimant's initial evidence regarding his post-injury wages is inconsistent with his later testimony and subsequently produced bank records.

Claimant initially maintained that he did not return to work until late-June 2011. However, he later admitted performing work and getting paid before his TTD payments stopped on April 15, 2011:

- he installed a floor and a kitchen countertop in March 2011 and received credit toward three months rent;
- he received a \$664 payment, which he could not explain, on March 21, 2011;
- he was paid \$1,200 on March 31, 2011;
- he was paid \$1,640 on April 11, 2011, for a bathroom;
- he was paid \$2,270 for a fence on April 22, 2011 (the record does not establish when this work was performed); and
- he was paid \$800 for work at some unknown time in April 2011. This work could have occurred after April 15, 2011, but the record is not clear.

Claimant may have last cashed a TTD check on April 27, 2011. Insofar as this April 27, 2011 bank transaction totaled \$380 and claimant's TTD rate was \$373.33, whether the transaction involved a TTD check is debatable.

It was inconsistent for claimant to take money for being temporarily and totally disabled when he was not so disabled. This fact weighs against claimant's credibility.

Claimant's business records showing income are lacking. Claimant testified that he maintained receipts showing customer payments, expenses and whether materials were included in a bid. He testified that he would submit such receipts when he files his taxes. Claimant did not file taxes in 2010, 2011 or 2012, which makes determining his post-injury wage difficult.<sup>14</sup> He produced no receipts. Claimant produced a fraction of requested invoices. He only produced nine invoices, all from 2011, while he received at least three dozen checks from customers. However, claimant testified as to his belief that his bank records documented any earnings that would have been documented in the lost receipts.

In regular hearing Exhibit 1 and in his regular hearing testimony, claimant alleged earning \$10,868 in 2011 and \$7,414 in 2012. However, claimant excluded a number of sources of income from his regular hearing exhibits, including:

- unknown payment - March 21, 2011 - \$664;
- fence for unknown person - March 31, 2011 - \$1,200;
- bathroom for Huebner - April 11, 2011 - \$1,640;
- fence for Villarreal - April 22, 2011 - \$2,270;
- bathroom for Morris - May 3, 2011 - \$1,247;
- remodel for Morris - May 18, 2011 - \$500;
- fence for unknown person - June/July 2011 - \$1,500;
- foundation repairs for Cutright - August 31, 2011 - \$1,500;
- painting for De Roth - November 29, 2011 - \$500;
- ceilings for Florian - March 14, 2012 - \$1,035;
- fence for Hernandez - May 16, 2012 \$2,000;
- fence for Germaine - \$450, fence for unknown woman - \$750, and two jobs for unknown customers in the six months before his discovery deposition;
- remodel for Olmstead - August 21, 2012 - \$504;
- painting for Schultz - August 27, 2012 - \$1,145;
- work for Olmstead - August 31, 2012 - \$308;
- remodel for Olmstead - September 17, 2012 - \$590;
- bathroom for Schultz - October 9, 2012 - \$637.86;
- painting for Hedge - October 24, 2012 - \$450;
- bathroom for Hedge - October 30, 2012 - \$1,388; and
- fence for Morgan - December 12, 2012 - \$400.

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<sup>14</sup> Claimant's failure to file tax returns should not impact his credibility for two reasons. First, impeachment based on a crime involving dishonesty or false statement requires an actual conviction. See *State v. Scott*, 39 Kan. App. 2d 49, 57, 177 P.3d 972, 977 (2008). There is no evidence of a conviction. Second, it is uncertain if Kansas courts would view such a conviction as involving dishonesty or false statement. See *Cree v. Hatcher*, 969 F.2d 34, 37 (3d Cir. 1992); *FedEx Ground Package Sys. v. Futch*, 944 So. 2d 469, 472 (Fla. Dist. Ct. App. 2006).

The above information raises some obvious concerns. Given that the regular hearing occurred on December 13, 2012, it is unlikely that claimant would have such a poor memory as to forget what he was paid the prior day. Also, a number of the jobs in the prior paragraph are not verified by bank records, such as pay from Mr. Germaine or the \$1,500 fence job in June/July 2011.

There is also concern that claimant was sometimes paid in cash. Claimant contends that his pay from every project was deposited into account number 2408 and that he never retained any cash.<sup>15</sup> Claimant testified that he was only paid cash once, \$800, by his cousin, Debbie Huebner, in April 2011.<sup>16</sup> This testimony is inaccurate based on an invoice for the Villarreal fence referencing \$800 "cash," as noted in regular hearing Exhibit 2. However, there is only evidentiary proof of these two cash payments. The Board will not speculate as to unsubstantiated cash payments.

There are other examples of inconsistencies. Claimant's earnings from the May 20, 2011 Morris job fluctuate. Exhibit 1 from the regular hearing shows that he earned \$1,000 from this work. Exhibit 2 from the regular hearing suggests that he charged \$1,395 for the job. Claimant testified at his evidentiary deposition that he only earned \$695 from such work. Also, the figures on regular hearing Exhibits 1 and 2 are different and could be viewed as inconsistent, such as regular hearing Exhibit 2 recording \$3,200 on November 19, 2011 for work done for Villarreal, but regular hearing Exhibit 1 listed \$2,000 for the job. However, claimant testified that the higher figure was what he charged, while the lower figure was what he earned.

Despite all of the reasons that cast doubt on whether claimant proved his post-injury wages, claimant produced reliable evidence of his post-injury earnings at his evidentiary deposition. It is not "nearly impossible" to determine his earnings, as was the case in *Goudy*. Because of the bank records, the Board is not required to simply speculate about what claimant's post-injury earnings may be.

The Board readily acknowledges that claimant's omission of income at the regular hearing casts doubt on his credibility. However, the fact that claimant was either deceitful and tried to conceal income or merely lazy or indifferent in trying to prove his post-injury wage at the regular hearing does not change the reality that his subsequently produced bank records provide sufficiently reliable evidence upon which the Board may deduce the his post-injury earnings.

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<sup>15</sup> Claimant's Evidentiary Depo. at 42.

<sup>16</sup> *Id.* at 42-43.

The Board does not agree with commentary in the Award that claimant *repeatedly* failed or refused to produce records of post-injury earnings. Such conclusion may well be accurate in terms of what the record does not disclose, but it not supported by the evidence. The record shows that claimant was asked to produce documents during his July 9, 2012 deposition, including a 2010 tax return and business receipts.<sup>17</sup> While claimant did not produce the majority of his invoices or documentation of expenses, when he did produce a large number of records establishing post-injury earnings at his evidentiary deposition, respondent asserted that claimant's bank records were the best evidence of his post-injury earnings, and that regular hearing Exhibits 1 and 2 did not accurately reflect his post-injury earnings.<sup>18</sup>

The Board disagrees with claimant's assertion that he earned \$11,459.70 in 2011 and \$10,657.86 in 2012. The Board similarly disagrees with the notion that the evidence wholly fails to establish claimant's post-injury earnings because of an inconsistent record. While claimant's initial evidence regarding his post-injury earnings was lacking, the later produced bank records, coupled with his testimony concerning earnings not confirmed by bank records, provide ample and reliable evidence showing that he earned \$23,858.70 in 2011. In 2012, he earned \$19,138.86. Claimant's 2013 earnings through February 28 were \$3,485. These calculations are listed in this Order's Appendix 1.

Discrepancies between the Board's calculations and the Award's calculations are based on bank records establishing, more probably than not, that transactions listed on multiple occasions in the Award's Appendix A only occurred once.<sup>19</sup>

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<sup>17</sup> Claimant's Discovery Depo. at 24-25.

<sup>18</sup> Claimant's Evidentiary Depo. at 124. At oral argument, respondent waived such objection to regular hearing Exhibits 1-2 in order to show inconsistencies between such exhibits and records produced at claimant's evidentiary deposition.

<sup>19</sup> A \$560 job is listed three times in May 2012. Bank records document one transaction, a \$560 payment from Huston.

A June 3, 2011 job generated \$488.70, as noted by the copy of Kaysie Morris' check in Evidentiary Depo., Ex. 7, not \$488 from Kaysie and \$551.25 for Morris. Kaysie and Morris are the same person.

Appendix A shows claimant earned \$4,700 on September 13, 2011 (\$3,100 from Cutright and \$1,600 from Quiznos). Claimant charged Cutright \$3,100. Cutright paid \$1,500 on August 31, 2011. The Cutright's daughter, who owns the Quiznos, paid the remaining \$1,600 using a Quiznos check. While the Board is disturbed that claimant noted at the regular hearing that he earned \$1,600 from the Cutrights, the bank records that he produced show the total pay for the job was \$3,100.

The \$986 and \$947 charges for October 4 and 5, 2011, reflect the same \$986 figure, less a \$39 dump fee, as noted in regular hearing Exhibit 2. Bank records show that Schultz, not Schuster, issued payment.

Appendix A shows three sources (Shultz, Dreiling and Villarreal) potentially paying \$325 to claimant in January 2012. Bank records show that only Villarreal signed a \$325 Dreiling Trust check.

Bank records show that Huebner (not Folland) paid claimant \$260 in early-January 2012. Claimant testified that Huebner owned three rental properties and this work was for one of her rental properties.

Claimant's assertion that he proved his post-injury wage loss is bolstered by his acknowledgment of income not contained in bank records. Claimant listed income in regular hearing Exhibit 1 that is not confirmed by bank records, such as the \$1,625 fee from Dinkle, the \$500 fee from Ganstron, the \$600 fee from Smith and a total of \$1,350 from Robert in November 2012. If claimant wanted to conceal or downplay income, he would not have included this money in regular hearing Exhibit 1. It would also appear at odds with concealing or downplaying income for claimant to admit building a fence in June or July 2011 for \$1,500, building a fence in 2012 for Mr. Germaine for \$450 or building a fence in 2012 for an unknown woman in exchange for \$750.<sup>20</sup>

Additionally, claimant acknowledged that all money he received should be used in determining his post-injury wage, even though he previously asserted that much of the money he earned was paid to employees. If claimant were trying to increase his work disability award, he likely would maintain that cash payments to employees should not count as his income.

Moreover, the judge had the first-hand opportunity to assess claimant's credibility. While the judge plainly questioned claimant's ability to prove his post-injury wage, he did not indicate claimant was untruthful.

Finally, there are also indications in bank records that claimant is not reeling in money. Claimant sold a \$600 item on ebay on July 12, 2012, sold an old minivan for \$800 on April 16, 2012, held a garage sale generating \$113.32 on April 22, 2011, and accepted a \$1,750 gift from his brother to travel to Idaho on July 25, 2012, hardly signs of being a rich or busy contractor.

From April 16, 2011 until the end of the year and subtracting three weeks when he was in Idaho,<sup>21</sup> claimant earned \$23,858.70 and had a post-injury average weekly wage in 2011 of \$586.07 (43.71 weeks - 3 weeks in Idaho = 40.71 weeks;  $\$23,858.70 \div 40.71 \text{ weeks} = \$586.07$ ). When dividing his 2012 earnings of \$19,138.86 by 50.29 weeks (52.29 weeks less 2 weeks in Idaho), claimant's 2012 post-injury average weekly wage was \$380.57, a 32% wage loss. Claimant's earned \$3,485 in 2013 and his 2013 average weekly wage of \$413.41 resulted in a 26% wage loss ( $\$3,485 \div 8.43 \text{ weeks} = \$413.41$ ).

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<sup>20</sup> Respondent asserted at oral argument that claimant was not necessarily concealing income, but he still failed to meet his burden of proving his post-injury wage.

<sup>21</sup> Claimant testified that he visited his mother in Idaho for about three weeks in 2011. Claimant did not work July 25, 2012 through August 7, 2012 to visit his mother in Idaho. Claimant's Evidentiary Depo. at 69-70. Claimant also testified he did not work July 10 or 11, 2012, through late-August 2012 to visit his mother in Idaho. R.H. Trans. at 27. Time claimant spent in Idaho in 2011 and 2012 is not being used to determine his post-injury wage.

**Task Loss**

Claimant's task loss lies somewhere between the 0% figure supplied by Dr. Smith and the 50% figure supplied by Dr. Hufford. Dr. Smith's restrictions of take a break every 5-10 minutes are overly simplistic, whereas Dr. Hufford's restrictions seem to inflate claimant's disability in spite of claimant returning to multiple tasks, such as remodeling, tiling and fence installation, which undermine claimant's assertion that he simply has employees engage in heavier work. The Board sees no reason to disturb the Award's finding that claimant sustained a 25% task loss.

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board modifies the May 20, 2013 Award. Claimant has a 12.5% functional impairment to the body as a whole. Respondent overpaid temporary total disability benefits from March 1, 2011 through April 15, 2011, a period of 6.57 weeks. Respondent is entitled to a K.S.A. 44-525 credit for the TTD overpayment. Claimant has no wage loss for 2011, but has a 32% wage loss after December 31, 2011, as well as a 26% wage loss in 2013. Claimant has a 25% task loss. These figures result in claimant not being eligible for permanent partial general (work) disability in 2011, but a 28.5% work disability from January 1, 2012 through December 31, 2012, and a 25.5% work disability from January 1, 2013 forward. All other aspects of the Award not contrary to these conclusions are affirmed.

**AWARD**

**WHEREFORE**, the Appeals Board modifies the May 20, 2013 Award as listed above in the conclusion section.

The claimant is entitled to 26.57 weeks of temporary total disability (TTD) compensation at the rate of \$373.35 per week or \$9,919.91 followed by 50.43 weeks of permanent partial disability (PPD) compensation at the rate of \$373.35 per week or \$18,828.04 for a 12.5% functional disability, followed by 52.29 weeks of PPD compensation at the rate of \$373.35 per week or \$19,522.47 for a 28.5% work disability ending December 31, 2012, followed by 0.15 weeks of PPD compensation at the rate of \$373.35 per week or \$56 for a 25.5% work disability, making a total award of \$48,326.42.

As of September 13, 2013 there would be due and owing to the claimant 26.57 weeks of TTD compensation at the rate of \$373.35 per week in the sum of \$9,919.91 plus 102.87 weeks of PPD compensation at the rate of \$373.35 per week in the sum of \$38,406.51 for a total due and owing of \$48,326.42, which is ordered paid in one lump sum less amounts previously paid, including the \$13,555.13 already paid for PPD benefits, and less the credit for 6.57 weeks of overpaid TTD benefits totaling \$2,452.91, which are applied to the final week of PPD benefits and to each preceding week until the credit is exhausted.

Essentially, after accounting for the \$9,919 in TTD and \$13,555.13 in PPD already paid, and the \$2,452.91 TTD credit against the last 6.57 weeks of PPD, claimant is awarded an additional \$22,399.38 in PPD.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2013.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

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Honorable Bruce E. Moore

BRIAN D. NICHOLSON

P

DOCKET NO. 1,056,556

APPENDIX 1

Date	Money Received	Deposit	Money Paid to Claimant's Employees	Why Paid	Comments <sup>22</sup>
01/04/11	\$373.33	\$373.33 to 2408		TTD	25-26
01/10/11	\$373.33	\$373.33 to 2408		TTD	25-26
01/19/11	\$373.33	\$300.33 to 2408 \$73 cash out		TTD	25-26
01/21/11	\$373.33	\$150 to 2408 \$223.33 cash out		TTD	25-26
01/31/11	\$373.33	\$173.33 to 2408 \$200 cash out		TTD	25-26
02/10/11	\$746.66	\$350 to 2408 \$396.66 cash out		TTD	27
02/18/11	\$373.33	\$200 to 2408 \$173.33 cash out		TTD	27
02/22/11	\$373.33	\$200 to 2408 \$173.33 cash out		TTD	27

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<sup>22</sup> Page numbers are cites to claimant's evidentiary deposition, unless otherwise noted.



**BRIAN D. NICHOLSON**

**Q**

**DOCKET NO. 1,056,556**

03/05/11	\$373.33	\$300 to 2408 \$73.33 cash out		TTD	28
03/16/11	\$373.33	\$200 to 2408 \$173.33 cash out		TTD	28
03/21/11	\$664	\$200 to 2408 \$464 cash out		unknown	
03/26/11	\$746.66	\$300 to 2408 \$446.66 cash out		TTD	28
03/31/11	\$1,200 (a copy of this check is not in evidence)	\$500 to 2408 \$700 cash out	Claimant testified that Dan Gottschalk and Jeff Casper were paid. He never testified as to the amount, but his share was \$500.	fence for an unknown person	28-31
April 2011	\$800	no deposit - \$500 to claimant	Claimant testified that his share was \$500. He did not specifically indicate what amount, if any, was paid to employees.	Claimant's cousin, Debbie Huebner, paid him in cash for bathroom work.	6, 42-43 (This could be the same bathroom job listed below on 04/11/11, but bank records show the 04/11/11 deposit was in the form of a check.)

Q

**BRIAN D. NICHOLSON**

**R**

**DOCKET NO. 1,056,556**

04/08/11	\$373.33	\$73.33 to 2408 \$300 cash out		TTD	32
04/11/11	\$1,640	\$640 to 2408 \$1,000 cash out	Claimant testified that Dan Gottschalk and Jeff Casper were paid. He never testified as to the amount, but his share was \$640.	bathroom - Huebner	32-33
04/15/11	\$373.33	\$173.33 to 2408 \$200 cash out		TTD	35
04/22/11	\$2,270	\$1,000 to 2408 \$1,270 cash out		Fence - Villarreal	35-37
04/27/11	\$380	\$80 to 2408 \$300 cash out		TTD	37-38 (This figure might not represent a TTD check, insofar as the TTD rate was \$377.33.)
05/03/11	\$1,247	\$447 to 2408 \$800 cash out	Claimant testified that Jeff Casper helped. Claimant testified his own share was \$447, but never specifically mentioned Mr. Casper's pay, if any.	bathroom - Morris	39-40

R

**BRIAN D. NICHOLSON**

**S**

**DOCKET NO. 1,056,556**

05/12/11	\$560	\$160 to 2408 \$400 cash out	Claimant testified that Jeff Casper helped. Claimant testified that his own share was \$160, but never specifically mentioned Mr. Casper's pay.	bathroom - Huston	40, 110 (While claimant indicated in R.H. Trans., Cl. Ex. 1, that this job was for Morris, bank records show that Huston wrote the check.)
05/18/11	\$500	\$200 to 2408 \$300 cash out	\$300 - Jeff Casper	remodel - Morris	41-42, 111 (While claimant testified this work was for Morris, a copy of De Roth's \$500 check is in Evidentiary Depo. Trans., Ex. 7)
05/20/11	\$1,395	\$695 to 2408 \$700 cash out	Claimant testified his share was \$695. He did not specifically state what amount, if any, was paid to any employees.	remodel - Morris	43-44, 110 (R.H. Trans., Ex. 1, shows his net pay from this job as \$1,000.)

S

**BRIAN D. NICHOLSON****T****DOCKET NO. 1,056,556**

05/27/11	\$720	\$200 to 2408 \$500 cash out	\$500	remodel - Morris	44, 110 (Claimant listed this income as occurring on May 26, 2011. R.H. Trans., Ex. 1.)
06/01/11	\$375	?		Dinkle	(see R.H. Trans., Ex. 1)
06/03/11	\$488.70	\$200 to 2408 \$288.70 cash out		remodel - Morris	45, 111 (This is listed in R.H. Trans., Ex. 1, as \$488 for Kaysie; Kaysie and Morris are the same person: Kaysie Morris.)
June/July 2011	\$1,500	?	\$350 - Dan Gottschalk \$350 - Jeff Casper	fence	(see Claimant's Discovery Depo. at 20-21)
08/02/11	\$828	\$428 to 1428 \$400 cash out	\$400 - Dan Gottschalk	removing walls - Brown	89-92, 112 (This work and the work in the entry below combine to be \$2,413, which is \$35 less than the \$2,378 claimant listed in R.H. Trans., Ex. 1.)

**T**

**BRIAN D. NICHOLSON**

**U**

**DOCKET NO. 1,056,556**

08/10/11	\$1,585	\$985 to 1428 \$600 cash out	\$600 - Dan Gottschalk	Sidewalk - Brown	94, 112
08/31/11	\$1,500	\$1,300 to 1428 \$200 cash out	\$200 - Jeff Casper and \$200 to two college students	foundation repairs - Cutright	96-97, 99, 113 (Claimant says he withdrew \$200 to pay college students to help dig, such that he netted \$1,100, but there is no record of such withdrawal.)
09/13/11	\$1,600	\$800 to 1428 \$800 cash out	\$800 -Jeff Casper/Dan Gottschalk	foundation repairs - Cutright	98-100, 113 (A copy of a \$1,600 check from Quiznos of Hays is in Claimant's Evidentiary Depo. Trans., Ex. 7. The Cutright's daughter owns the Quiznos.)

U

**BRIAN D. NICHOLSON**

**V**

**DOCKET NO. 1,056,556**

10/06/11	\$986	\$700 to 1428 \$286 cash out	\$286 - Dan Gottschalk	repairs - Schultz	100, 113 (R.H. Trans., Ex. 1, identified this work as generating \$947 for Shuster on Skyline, which is \$986 less a \$39 dump fee listed in R.H. Trans., Ex. 2. Schultz wrote a \$986 check for repairs done on Skyline, per Claimant's Evidentiary Depo. Trans., Ex. 7.)
11/14/11	\$900	\$250 to 2408 \$250 to 1428 \$400 cash out	\$400 - Tanner Huebner	fence - Villarreal	48-50, 100, 114
11/21/11	\$2,600	\$850 to 2408 \$850 to 1428 \$900 cash out	\$500 - Dan Gottschalk	fence - Villarreal	50, 102, 115 (\$400 was for materials) (R.H. Trans., Ex. 1, listed \$2,000 for a November 19, 2011 date.).

**BRIAN D. NICHOLSON**

**W**

**DOCKET NO. 1,056,556**

11/29/11	\$500 - cannot find this in Claimant's Evidentiary Depo., Ex. 5, acct. 2408	\$250	\$250 - Dan Gottschalk	painting - De Roth	51-52 (claimant testified that there was a deposit slip for account no. 2408 showing \$500 for painting for De Roth. There is no deposit slip in evidence for that date, but on 11/29/11, claimant wrote a check for \$500 cash on account no. 2408)
01/03/12	\$325	\$50 to 1428 \$100 to 2408 \$175 cash out	\$50 - Dan Gottschalk	fence/snow - Villarreal (Cindy Villarreal signed the \$325 check from the Claire B. Dreiling Living Trust)	104, 115 (R.H. Trans., Ex. 1, indicates claimant received \$325 from Shultz.)

W

**BRIAN D. NICHOLSON**

**X**

**DOCKET NO. 1,056,556**

01/19/12	\$260	\$50 to 1428 \$50 to 2408 remainder as cash out		remodel or repair door - Huebner	56-57, 105 (R.H. Trans., Ex. 1, indicates claimant received \$260 from Folland. Claimant testified Huebner owns three rental properties and this work was on one of her rentals.)
02/29/12	\$1,625 (not confirmed in bank records)	?		work for Dinkle	this figure is not confirmed by bank records
03/13/12	\$1,035	\$800 to 2408 \$235 cash out	\$235 - Dan Gottschalk	ceilings - Florian	58-60
04/20/12	\$469	?		?	This figure, listed in R.H. Trans., Ex. 1, matches up with the May 14, 2012 entry below.

X



**BRIAN D. NICHOLSON**

**Y**

**DOCKET NO. 1,056,556**

04/23/12	\$535	\$300 to 2408 \$235 cash out	\$235 - Dan Gottschalk	fence - Seltmann	60; it appears claimant erroneously wrote Schultz on R.H. Trans., Ex. 1, as Seltmann wrote the check
05/09/12	\$500 (not confirmed in bank records)	?		work for S. Ganstron	see R.H. Trans., Ex. 1
05/14/12	\$469	\$100 to 2408 \$100 to 1428 \$269 cash out	\$269 - Dan Gottschalk	siding/gutter - Schultz	62, 107, 116
05/16/12	\$2,000	\$1,500 to 2408 \$500 cash out	claimant kept all of the money after trading two pistols to Dan Gottschalk	fence - Hernandez	63-64
06/26/12	\$600 (not confirmed in bank records)	?		work for T. Smith	See R.H. Trans., Ex. 1

Y

**BRIAN D. NICHOLSON**

**Z**

**DOCKET NO. 1,056,556**

in six months before 07/09/12 deposition	\$450 (not confirmed in bank records)	?	\$120 - Tanner Huebner	small fence - Germaine	see Claimant's Discovery Depo. at 15-16
in six months before 07/09/12 deposition	?	?		guttering and soffit boards for a woman	see Claimant's Discovery Depo. at 14-15
in six months before 07/09/12 deposition	\$750 (not confirmed in bank records)	?	\$175 - Tanner Huebner	fence for a woman	see Claimant's Discovery Depo. at 15-17
in six months before 07/09/12 deposition	?	?		two jobs that claimant could not remember	see Claimant's Discovery Depo. at 17

**Z**

**BRIAN D. NICHOLSON**

**AA**

**DOCKET NO. 1,056,556**

08/21/12	\$504		\$252 - Dan Gottschalk	remodel - Olmstead	72-73 (Claimant testified Olmstead wrote him a check, but he could not explain why he did not have a copy of the check.)
08/27/12	\$1,145	\$745 to 2408 \$400 cash out	\$400 - Dan Gottschalk	painting - Schultz	71
08/31/12	\$308	\$100 to 2408 \$208 cash out	Claimant testified that he gave Dan Gottschalk \$108 and kept \$200, but that is different from what bank records indicate.	work for Olmstead	
09/17/12	\$590	\$300 to 2408 \$290 cash out	Claimant testified that Dan Gottschalk helped, but there is no evidence what Mr. Gottschalk may have earned.	remodel - Olmstead	74
09/27/12	\$420	\$200 to 2408 \$220 cash out	\$220 - Jeff Casper	shower - Hilker	76
10/09/12	\$673.86	\$400.86 to 2408 \$273 cash out	\$273 - Dan Gottschalk	bathroom - Schultz	77

AA

**BRIAN D. NICHOLSON**

**BB**

**DOCKET NO. 1,056,556**

10/10/12	\$1,000	?		work for Heiker <sup>23</sup>	see R.H. Trans., Ex. 1
10/19/12	\$980	\$500 to 2408 \$480 cash out	\$480 - Jeff Casper	bathroom - Hilker	78-79
10/24/12	\$450	\$100 to 2408 \$350 cash out	\$350 - Jeff Casper	painting - Hedge	79-80
10/30/12	\$750	?		work for Heiker	see R.H. Trans., Ex. 1
10/30/12	\$1,388	\$500 to 2408 \$888 cash out	\$888 - Jeff Casper	bathroom - Hedge	80-81
Nov. 2012	\$850 (not confirmed in bank records)	?		work for Robert	see R.H. Trans., Ex. 1
Nov. 2012	\$500 (not in bank records)	?		work for Robert	see R.H. Trans., Ex. 1
11/07/12	\$1,080	\$400 to 2408 \$680 cash out	\$680 - Jeff Casper	landscaping - Hilker	81-82
12/12/12	\$400	\$200 to 2408 \$200 cash out		fence - Morgan	

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<sup>23</sup> It appears claimant's reference to Heiker in exhibit 1 of the regular hearing is synonymous with Hilker. For wage calculations, the Board is only considering the Hilker transactions, which exceed the Heiker transactions.

**BB**

**BRIAN D. NICHOLSON**

**CC**

**DOCKET NO. 1,056,556**

12/17/12	\$450	\$250 to 2408 \$200 cash out		fence - Morgan	
12/24/12	\$367	\$200 to 2408 \$167 cash out		fence repair - Basgall	
12/30/12	\$15	\$15 to 2408		work for Basgall	
010/2/13	\$90	\$90 to 2408		work for Walker and Hartman	
01/03/13	\$524	\$200 to 2408 \$324 cash out		work for Morgan	
01/16/13	\$600 (two checks)	\$200 to 2408 \$400 cash out		work for Morgan	
01/22/13	\$850	\$200 to 2408 \$650 cash out		work for Morgan	
02/13/13	\$650	\$300 to 2408 \$350 cash out		work for Morgan	
02/28/13	\$771	\$300 to 2408 \$471 cash out		work for Morgan	

CC